No. 18-485

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,
v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF INDIANA, ARKANSAS, LOUISIANA, NEBRASKA, OHIO, SOUTH CAROLINA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the statute of limitations for a claim for damages based on the alleged use of fabricated evidence to institute criminal proceedings, brought under 42 U.S.C. § 1983, begins to run when the defendant discovers that fabricated evidence has been introduced in the criminal proceedings or when those proceedings are terminated in the defendant's favor.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Arkansas, Louisiana, Nebraska, Ohio, South Carolina, and Texas respectfully submit this brief as *amici curiae* in support of respondent.

Officials of *Amici* States are frequent defendants in cases brought under 42 U.S.C. § 1983, and for that reason they have a strong interest in promoting clarity in the law governing 1983 claims. As this case shows, lower courts' decisions and litigants' filings frequently display profound confusion over the nature of the 1983 claims at issue, including such fundamental matters as which constitutional rights and which common-law analogies—if any—the claims implicate.

In addition, the *Amici* States have an interest in ensuring that courts do not expand the set of claims cognizable under section 1983 to include theories unsupported by the Constitution. Petitioner asks the Court to set an accrual rule for a "fabrication of evidence" claim, a claim unmoored from any particular constitutional provision. If the Court were to accept this claim, it could subject state officials to 1983 claims that the Constitution does not authorize. Rather than address the accrual question presented by the petition, the Court should either dismiss the writ as improvidently granted or affirm the decision below on the ground that Petitioner has failed to state a

claim at all. Many cases cleanly present questions regarding the proper accrual rule for particular 1983 claims. This case is not one of them.

SUMMARY OF ARGUMENT

Section 1 of the Civil Rights Act of 1871 provides that any person who, under color of state law, deprives any person of "any rights . . . secured by the Constitution of the United States, shall . . . be liable to the party injured," 17 Stat. 13 (1871), Rev. Stat. § 1979 (1875). Although this provision, now codified as amended as 42 U.S.C. § 1983, has been the subject of hundreds of thousands of decisions in the nearly 150 years since its adoption, it continues to be a source of "conflict, confusion, and uncertainty." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985).

This case is a prime example of the conceptual fog that has descended upon much of the litigation involving section 1983. Petitioner Edward McDonough was indicted for allegedly participating in a scheme of absentee-ballot fraud, and he claims respondent Youel Smith, the special prosecutor who directed his prosecution, framed him by "using forged affidavits, offering false testimony, and using faulty DNA methods." Pet. App. 5a. McDonough was never convicted—his first trial ended with a mistrial and his second concluded with his acquittal—and it is unclear whether he spent any significant time in custody, as he apparently was arrested and released on his own recognizance following his indictment. Pet. Br. 40. If he had been subject to a meaningful period of detention, the

complaint McDonough filed in response to the alleged frame-up presumably would have showcased his pre-trial custody. Instead, the 174-page, 1220-paragraph complaint seeks damages for his alleged financial, emotional, and reputational costs of undergoing the two criminal trials. J.A. 249–51, ¶¶ 1198–1208.

McDonough's complaint seeks these damages via two 1983 claims, one a "Constitutional Right Not to be Deprived of Liberty as a Result of Fabrication of Evidence," and the other a "Constitutional Right Not to be Prosecuted Maliciously without Probable Cause." *Id.* at 252–53. Notably, the complaint does not identify the precise constitutional source of these rights, *see id.* (listing only the Fourth, Fifth, Sixth and Fourteenth Amendments generally), and McDonough has not clarified his theories since. As the suit progressed, the constitutional foundations of McDonough's claims never materialized; the parties and courts merely characterized the claims as a "fabrication of evidence claim" and a "malicious prosecution" claim. Pet. App. 47a; *see also id.* at 6a (decision below stating that McDonough claims the defendants "(1) had violated his right to due process by fabricating evidence and later using it against him before the grand jury and in his two trials and (2) were liable for malicious prosecution"). Even now, McDonough's merits brief maintains that the Court need not "delve into what the elements of McDonough's constitutional claim are." Pet. Br. 19.

In short, McDonough has continually ignored "the threshold inquiry in a § 1983 suit, which requires courts to '*identify the specific constitutional right' at issue.*" *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) (emphasis added) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion)). Only "[a]fter pinpointing that right," should courts "determine the elements of, and rules associated with, an action seeking damages for its violation." *Id.* McDonough has never clearly articulated the constitutional source of either of his claims, and the question he asks the Court to answer—when the statute of limitations began running against his "fabrication of evidence" claim—therefore "jump[s] the gun." *Id.* at 922 n.10.

Because it is impossible to answer the accrual question purportedly before the Court, the Court should either dismiss the writ as improvidently granted or affirm the dismissal of McDonough's claim on the ground that McDonough has failed to state a claim at all.

I. The history of section 1983 litigation shows that failing to identify the federal law "deprivation" underlying a 1983 claim inevitably sows confusion. *Id.* at 920. *Manuel* reminded courts that their first task is always to "identify the specific constitutional right at issue." *Id.* That task focuses the inquiry on the central constitutional issue and paves the way to answer later questions that depend on the claim's underlying

theory. The Court has taken precisely this constitution-first approach in prior cases addressing accrual rules. Because McDonough has failed to explain the constitutional basis of his claim, it is useless to attempt to answer his accrual question. The Court therefore should dismiss the writ as improvidently granted.

II. Even if the Court were to overlook McDonough's failure to identify specifically the constitutional right at issue, it is clear that the Due Process Clause does not recognize any such right. McDonough posits that the Due Process Clause may prohibit "subjecting a defendant to criminal charges on the basis of fabricated evidence," Pet. Br. 41, but this suggestion is foreclosed by the longstanding rule that the accused is not "entitled to judicial oversight or review of the decision to *prosecute*"—as opposed to the decision to *seize and detain*. *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (emphasis added). This means that the only right that could *possibly* support McDonough's "fabrication of evidence" claim is the Fourth Amendment right not to be seized without probable cause. Critically, however, any Fourth Amendment theory in this case was entirely encompassed by McDonough's "malicious prosecution" claim—which lower courts dismissed as to Smith on absolute immunity grounds, and which remains pending against the other defendants. And because the defendants have never had occasion to address the necessary elements of such a Fourth Amendment claim,

it would be unfair to permit McDonough to refashion his "fabrication of evidence" claim at this late date.

Accordingly, the Court should either dismiss the writ as improvidently granted or affirm the lower courts' dismissal of McDonough's "fabrication of evidence" claim.

ARGUMENT

I. Because McDonough Has Not Identified the Specific Right Underlying His Claim, the Court Cannot Decide When It Accrued

A. Lower court confusion underscores the importance of first identifying the basis of each particular 1983 claim

While the Civil Rights Act of 1871 created a "remedy for the violation of constitutional rights," *Wilson v. Garcia*, 471 U.S. 261, 277 (1985), it did not "contain a specific statute of limitations governing § 1983 actions," *id.* at 266. This statutory lacuna, "commonplace" in federal law, *id.*, has required courts to look to state law and general common-law principles to determine both the length and the beginning of the limitations period. And these common-law analogies, while often useful, also frequently distract courts and litigants from the central question in every 1983 case—whether the defendant, acting under color of state law, violated a right the Constitution confers on the plaintiff.

Courts originally determined the length of the limitations period in 1983 cases by "seeking state-law analogies for particular § 1983 claims" and choosing the limitations period for the state-law claim most analogous to the particular 1983 claim at issue. *Owens v. Okure*, 488 U.S. 235, 240 (1989). Because the "constitutional claims that have been alleged under § 1983 . . . encompass numerous and diverse topics and subtopics," and because "almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action," this practice "inevitably [bred] uncertainty and time-consuming litigation." *Wilson*, 471 U.S. at 272–73; *see also Owens*, 488 U.S. at 240. The Court ultimately resolved that confusion by identifying a single limitations period for each State—the period applicable to the State's personal-injury torts—and applying that period to *all* 1983 claims. *Id.* at 236.

Lower courts have continued to struggle, however, to identify rules for determining when limitations periods *begin* for 1983 claims. The limitations clock generally starts ticking when the plaintiff "has a complete and present cause of action." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (internal quotation marks and citation omitted). But that rule requires courts to determine which elements constitute a "complete" cause of action for the various types of 1983 claims. And to answer that question courts have again looked for state-law and common-law analogies.

In *Heck v. Humphrey*, 512 U.S. 477, 478–79 (1994), for example, the Court applied the favorable-termination element of common-law malicious prosecution to a 1983 wrongful conviction and confinement claim predicated on the destruction of exculpatory evidence. The Court held that such a 1983 claim does not accrue until the plaintiff's "conviction or sentence has . . . been invalidated." *Id.* at 487. And in *Wallace*, the Court relied on the common-law rules for false arrest and false imprisonment to conclude that a 1983 claim for an unconstitutional arrest accrues "as soon as the allegedly wrongful arrest occur[s]," 549 U.S. at 388—although the limitations period does not begin until the "false imprisonment [comes] to an end" with the initiation of legal process, *id.* at 389.

There is strong support for using common-law analogies to resolve difficult questions unanswered by the statutory text: The Civil Rights Act of 1866 endorses "extend[ing]" state common law to 1983 cases when necessary. *See* 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1988); *Wilson*, 471 U.S. at 266–69. And the Court has long recognized that section 1983 "should be read against the background of tort liability." *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978); *see also Carey v. Piphus*, 435 U.S. 247, 257–258 (1978).

But while common-law analogies can be useful for implementing section 1983, it is crucial to remember

that "§ 1983 provides a uniquely federal remedy . . . [that] can have no precise counterpart in state law." *Wilson*, 471 U.S. at 271–72 (internal quotation marks and citations omitted); *see id.* at 272 ("[I]t is 'the purest coincidence' when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." (quoting *Monroe*, 365 U.S. 167 at n.5 (Harlan, J., concurring))). Common-law analogies, unfortunately, sometimes obscure section 1983's focus on the "deprivation" of a constitutional right, leading litigants and lower courts to confuse the common-law analogues with the actual 1983 claims.

For example, many 1983 plaintiffs—including McDonough—raise what they call "malicious prosecution" claims without ever identifying the precise constitutional deprivations that would make the claims actionable under section 1983. *See, e.g., Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring) (observing that the plaintiff sought damages on the ground that "local law enforcement officials violated his Fourth or maybe his Fourteenth Amendment rights (we're never told which) by committing the common law tort of malicious prosecution," and that even the defendants "accept[ed] the premise that the Constitution somewhere (they too never say where) contains something resembling a malicious prosecution tort").

Similarly, courts adjudicating "malicious prosecution" 1983 claims often share "a common shortcoming—either not demanding that this genre of claims identify specific constitutional deprivations or struggling in their efforts to do so." *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (en banc). As the Fifth Circuit has recognized, using the "malicious prosecution" label, particularly without identifying the specific constitutional provision at issue, "only invites confusion." *Id.* at 954.

Like the earlier problems with matching 1983 claims to particular state-law torts for the purpose of identifying the applicable limitations period, parties' and courts' focus on common-law analogues rather than the constitutional violations themselves has led to "a mix of misstatements and omissions which leads to . . . inconsistencies and difficulties." *Id.* at 949; *see also Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) ("If a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion gained by calling the legal theory 'malicious prosecution.'" (internal brackets, quotation marks, and citation omitted)). In sum, failing to specify the constitutional right at issue in 1983 cases leads to mistaken conclusions and an increasingly unwieldy 1983 doctrine. *Cf. Graham v. Connor*, 490 U.S. 386, 394 (1989) (explaining that the validity of an "excessive force" claim under section 1983 "must . . . be judged by reference to the specific constitutional

standard which governs that [particular constitutional] right, rather than to some generalized 'excessive force' standard" (citations omitted)).

For these reasons, before determining the accrual rule for a particular type of 1983 claim, the Court should "insist on clarity in the identity of the constitutional violations asserted." *Castellano*, 352 F.3d at 945.

B. This case shows the need to identify the right underlying a 1983 claim

McDonough has failed to specify the constitutional basis of his claims, and his case aptly illustrates the hazards of proceeding with a 1983 case without a clear idea of the alleged constitutional violation at issue. As noted above, McDonough's complaint suggested that his "fabrication of evidence" and "malicious prosecution" claims could be premised on violations of the Fourth, Fifth, Sixth, and Fourteenth Amendments generally, without specifying which constitutional provisions were connected to which claims or how *any* of these provisions support either of the claims. *See* J.A. 249–51, ¶¶ 1198–1208.

More egregiously, in responding to the defendants' motions to dismiss in the district court, in his briefs on appeal, and now before this Court, McDonough has continued to refuse to specify whether the constitutional violation should be "characterized as a seizure without probable cause, a violation of due process, or

the absence of a fair trial." Cert. Pet. 25–26. His merits brief offers a few fleeting suggestions for how to ground his "fabrication of evidence" claim in a specific constitutional violation, Pet. Br. 41–43, but he remains unwilling to commit to any single theory. Indeed, he repeatedly asserts that there is "no need for the Court to determine the elements of the Section 1983 claim or otherwise analyze the cause of action." *Id.* at 3; *see also id.* at 19 ("The Court thus does not need to delve into what the elements of McDonough's constitutional claim are."); *id.* at 42 ("This Court need not decide in this case whether a Section 1983 claim based on fabrication of evidence should be textually housed within the Fourth Amendment or the Due Process Clause (or even within the Sixth Amendment).").

McDonough is certainly not the first 1983 plaintiff to refuse to spell out the constitutional violation that underlies his "fabrication of evidence" claim. For example, the Second Circuit itself, which has said a "fabrication of evidence" claim exists under section 1983, has repeatedly and explicitly refused to say where in the Constitution such a claim can be found. *See, e.g.*, *Ganek v. Leibowitz*, 874 F.3d 73, 90 n.10 (2d Cir. 2017); *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 276 n.6 (2d Cir. 2016); *Morse v. Fusto*, 804 F.3d 538, 547 n.7 (2d Cir. 2015).

Unsurprisingly, such refusal has led to "confusion" in the Second Circuit's cases. *McIntosh v. City of New York*, 722 Fed. App'x 42, 45 n.2 (2d Cir. 2018). But the

Second Circuit's unwillingness to define the constitutional right at issue is no excuse for McDonough's failure to do so; it is McDonough's responsibility to plead his claims adequately. And if the Court were to jump ahead to McDonough's accrual question without identifying the constitutional right underlying his claim, it would expand the confusion over "fabrication of evidence" claims far beyond the Second Circuit.

In skipping ahead to the accrual question, McDonough defies the Court's repeated instruction that "in any § 1983 action the initial inquiry must focus on . . . the two essential elements to a § 1983 action," whether the defendant "act[ed] under color of state law" and whether his conduct deprived the plaintiff "of rights . . . secured by the Constitution." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

Again, the Court squarely addressed this issue just two terms ago, when it held that "the threshold inquiry in a § 1983 suit . . . requires courts to 'identify the specific constitutional right' at issue." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion)). The Court obligated lower courts to "determine the elements of, and rules associated with," a 1983 claim only "*[a]fter* pinpointing [the] right" underlying the claim. *Id.* (emphasis added).

As noted above, starting 1983 cases by identifying the constitutional right at issue minimizes confusion

and keeps the purpose of section 1983—remedying constitutional (and other federal law) violations—at the forefront. In addition, it is necessary to specify the constitutional right before proceeding to other questions because in the process of "applying, selecting among, or adjusting common-law approaches" to these questions "courts must closely attend to the values and purposes of the constitutional right at issue," *id.* at 921—which courts cannot do if they do not know *which* right is at stake.

Indeed, the Court's cases addressing when 1983 claims accrue often turn on the type of claim at issue. In *Heck*, for example, the Court confronted a 1983 claim brought by a prisoner who had been convicted of voluntary manslaughter following what he alleged was an "unlawful, unreasonable, and arbitrary investigation" that involved the knowing destruction of exculpatory evidence and the use of "an illegal and unlawful voice identification procedure" at his trial. 512 U.S. at 478–79. The Court held that the prisoner's "damages claims challenged the legality of the conviction" under the Due Process Clause, *id.* at 490, and that therefore his claim would not accrue until his "conviction or sentence has . . . been invalidated," *id.* at 486–87.

Meanwhile, in *Wallace* the Court held that a different accrual rule applied because the plaintiff had asserted a different sort of 1983 claim: He alleged that "officers had arrested [him] without probable cause, in violation of the Fourth Amendment." 549 U.S. at

386. The Court held that such Fourth Amendment unlawful-arrest claims accrue "as soon as the allegedly wrongful arrest occur[s]," though the limitations period begins only when the "false imprisonment [comes] to an end" with the initiation of legal process. *Id.* at 388–89.

Here, the Court cannot engage in the analysis it undertook in *Heck* and *Wallace* until it pins down which constitutional right of which McDonough alleges he was "depriv[ed]." 42 U.S.C. § 1983. Even if the Court were simply to apply "the standard rule that [accrual occurs] when the plaintiff has 'a complete and present cause of action,'" it would need to know which elements "complete" the cause of action. *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (brackets in original)).

Because McDonough has failed to complete even the first step of the 1983 analysis, the Court should refuse to skip ahead to his question regarding the accrual rule for his "fabrication of evidence" claim. "When the parties cannot be bothered to identify the source of their supposedly constitutional complaint," there is no reason to "enter[] a fight over an element of a putative constitutional cause of action that may not exist." *Cordova*, 816 F.3d at 666 (Gorsuch, J., concurring).

II. McDonough Has Failed to State a Cognizable 1983 Claim

Although McDonough still will not settle on a single constitutional theory, his merits brief now at least asserts that his claim rests on the proposition "that to initiate and maintain criminal proceedings against a defendant on the basis of fabricated evidence violates the Constitution." Pet. Br. 43. He offers two cursory suggestions for what provision of the Constitution that conduct might violate: the Due Process Clause and the Fourth Amendment.* Neither provision applies here. No Due Process Clause violation occurred because McDonough's criminal trial did not produce a *conviction* without due process of law. Moreover, McDonough says his claim rests on his allegation that proceedings against him were "initiate[d] and maintain[ed]" on the basis of fabricated evidence, but the Court has long held that the Due Process Clause does

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* McDonough also briefly gestures towards the Sixth Amendment, Pet. Br. 42–43 n.12, but he fails to explain how a Sixth Amendment "fair trial" violation could occur if the trial ends in an acquittal. And the Second Circuit case on which he relies, *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (cited in *Morse v. Fusto*, 804 F. 3d 538, 547 n.7 (2d Cir. 2015)), itself cites three of this Court's *Due Process Clause* cases for the proposition that "like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable 'corruption of the truth-seeking function of the trial process.'" *Ricciuti*, 124 F.3d at 130 (quoting *U.S. v. Augurs*, 427 U.S. 97, 104 (1976), and citing *Giglio v. United States*, 405 U.S. 150, 153 (1972), and *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

not impose constitutional requirements on the decision to bring criminal charges.

The Fourth Amendment does impose restrictions on pre-conviction *seizures*, and McDonough *may* have a Fourth Amendment claim lurking among the facts of this case; but he has not clearly articulated such a claim. And even if he had a Fourth Amendment claim, his "malicious prosecution" claim—which the lower courts dismissed as to Smith and which is currently pending against the other defendants—*is* his Fourth Amendment claim. Because McDonough has no free-standing "fabrication of evidence" claim, the Court should either dismiss the writ as improvidently granted or affirm the lower courts' dismissal of the claim.

A. McDonough does not have a Due Process Clause claim

The Fourteenth Amendment's Due Process Clause does not "protect[] against *all* deprivations of life, liberty, or property by the State," but "protects only against deprivations 'without due process of law.'" *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (emphasis added) (quoting *Baker v. McCollan*, 443 U.S. 137, 145 (1979)), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). The Due Process Clause analysis therefore requires the Court to determine the precise deprivation at issue and then determine what process, if any, the Constitution makes "due." Of course, when a liberty deprivation consists of imprisonment pursuant to a criminal conviction,

due process encompasses the strict requirements the Constitution imposes on criminal trials. *See Albright v. Oliver*, 510 U.S. 266, 283 (1994) (Kennedy, J., concurring in the judgment). It is thus black-letter law that a person who is convicted and then confined because of destroyed or fabricated evidence—and who is later acquitted—may bring a Due Process Clause claim under section 1983. *See, e.g.*, *Heck v. Humphrey*, 512 U.S. 477 (1994); *Napue v. Illinois*, 360 U.S. 264 (1959).

Because McDonough was not convicted, however, he must identify some other deprivation. He may not simply assert that the defendant fabricated evidence: "[I]f an officer (or investigating prosecutor) fabricates evidence and puts that fabricated evidence in a drawer, making no further use of it, then the officer has not violated due process; the action did not cause an infringement of anyone's liberty interest." *Bianchi v. McQueen*, 818 F.3d 309, 319 (7th Cir. 2016) (quoting *Whitlock v. Brueggemann*, 682 F.3d 567, 582 (7th Cir. 2012) (brackets in original)). Notably, McDonough does not allege that his liberty deprivation consisted of pretrial detention; it appears, in fact, that McDonough was released on his own recognizance following his arraignment. Pet. Br. 40. He instead argues that "[b]eing subject to criminal proceedings on the basis of fabricated evidence was an ongoing deprivation of McDonough's liberty." *Id.* at 47. As the United States puts it, McDonough's purported liberty deprivation thus concerns the "*initiation of criminal proceedings*" itself. U.S. Br. 7; *see also* Pet. Br.

14–15 ("The 'gravamen' of his claim . . . is the 'wrongfulness' of the criminal proceedings against him.").

McDonough provides no reason, however, to conclude that the initiation and continuation of criminal proceedings, standing alone, constitute a deprivation of "liberty" under the Due Process Clause. All three of the Court's cases he cites in support of his Due Process Clause theory involved *convictions*. *See* Pet. Br. 41 (citing *Briscoe v. LaHue*, 460 U.S. 325, 326 n.1 (1983); *Miller v. Pate*, 386 U.S. 1, 7 (1967); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

Furthermore, notwithstanding McDonough's bald assertion that there is "no question that being indicted and criminally tried is a serious deprivation of liberty," *id.* at 40, at least three circuits have explicitly *rejected* his position, holding that "causing charges to be filed without probable cause will not without more violate the Constitution." *Castellano v. Fragozo*, 352 F.3d 939, 953–54 (5th Cir. 2003) (en banc); *see also Massey v. Ojaniit*, 759 F.3d 343, 354 (4th Cir. 2014) ("Fabrication of evidence alone is insufficient to state a claim for a due process violation; a plaintiff must plead adequate facts to establish that the loss of liberty—i.e., his conviction and subsequent incarceration—resulted from the fabrication."); *Alexander v. McKinney*, 692 F.3d 553, 557 n.2 (7th Cir. 2012) (holding that "the burden of appearing in court and attending trial" does not "in and of itself, constitute a deprivation of liberty," reasoning that "[i]t

would be anomalous to hold that attending a trial deprives a criminal defendant of liberty without due process of law, when the purpose of the trial is to effectuate due process"). Indeed, because initiating and maintaining a criminal prosecution is not itself a liberty deprivation, the Seventh Circuit has repeatedly rejected due process claims where, as here, the 1983 plaintiff was charged, arrested, arraigned, promptly released, and eventually acquitted. *See, e.g.*, *Bianchi*, 818 F.3d at 319–20; *Saunders-El v. Rohde*, 778 F.3d 556, 560 (7th Cir. 2015); *Alexander*, 692 F.3d at 557 & n.2.

These circuits have rejected Due Process Clause theories like McDonough's because this Court's precedents squarely foreclose them. The Court has specifically held that "injury to reputation by itself [i]s not a 'liberty' interest protected under the Fourteenth Amendment. . . . Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert v. Gilley*, 500 U.S. 226, 233 (1991); *see also Paul v. Davis*, 424 U.S. 693, 712, (1976) ("[T]he interest in reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law."). And if simply initiating a prosecution were a liberty deprivation, the Constitution necessarily would impose some standard or some procedural protections on the decision to bring criminal charges; but the Court has long rejected the idea that the Constitution provides for "judicial oversight or review of the decision to prosecute." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

Thus, in *Albright v. Oliver*, a majority of the Court specifically held that there is no "substantive due process right to be free of prosecution without probable cause." 510 U.S. 266, 271 (1994) (plurality opinion); *see also id.* at 281 (Kennedy, J., concurring in the judgment). And at least a plurality of the Court concluded that the "right to be free of prosecution without probable cause" could not be found within *procedural* due process principles either. *See id.* at 275 (Scalia, J., concurring) ("I think it unlikely that the procedures constitutionally 'due,' with regard to an arrest, consist of anything more than what the Fourth Amendment specifies."); *id.* at 283 (Kennedy, J., concurring in the judgment) ("[T]he due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution."); *see also Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018) (decision on remand) (Easterbrook, J.) (noting that there is "no such thing as a constitutional right not to be prosecuted without probable cause" (quoting *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013)).

Finally, even if McDonough could demonstrate that he suffered a "deprivation of liberty" prior to his acquittal, he would need to establish that he was not afforded the process the Constitution makes "due." And critically, "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the *Fourth Amendment* to address it." *Albright*, 510 U.S. at 274 (plurality opinion) (emphasis added). As the Court recently reiterated, "*Gerstein* and *Albright* . . .

both reflected and recognized" a "constitutional division of labor" between the Due Process Clause and the Fourth Amendment: The Due Process Clause establishes the procedures the government must follow before depriving an individual of life, liberty, or property as a result of a criminal conviction, while the Fourth Amendment "provides 'standards and procedures'" governing the deprivation of an individual's liberty or property "'*pending trial*.'" *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 n.8 (2017) (quoting *Gerstein*, 420 U.S. at 125 n. 27 (emphasis added in *Manuel*)).

In short, because any liberty deprivation McDonough may have suffered would be governed by the Fourth Amendment, any claim he might have would arise, if at all, under the Fourth Amendment.

B. Any Fourth Amendment claim McDonough may have is encompassed by his "malicious prosecution" claim

Although the circumstances of this case perhaps *could* give rise to a 1983 claim for a violation of the Fourth Amendment, the Court should refuse to assume the existence of such a hypothetical claim for the purpose of answering McDonough's accrual question. Because McDonough has never clearly articulated a Fourth Amendment theory, the parties have never had occasion to address what elements such a claim would have or brief whether McDonough has alleged facts sufficient to support those elements. And in any case, McDonough has *already* had a chance to pursue a Fourth Amendment claim—under the label

of "malicious prosecution"—which was dismissed as to Smith on absolute immunity grounds and remains pending against the other defendants.

Throughout this litigation McDonough has chosen not to frame his "fabrication of evidence" claim in Fourth Amendment terms. Particularly in light of the Second Circuit's affirmance of the dismissal of McDonough's "malicious prosecution" claim against Smith, it would be unfair to give McDonough a second bite at the apple by allowing him to refashion a claim he failed to articulate earlier.

The defendants have never had an opportunity to dispute the necessary elements of a Fourth Amendment claim, and there is little in the briefing before the Court addressing how the unique features of Fourth Amendment claims might affect when the limitations period for those claims begins. For example, without a "seizure," McDonough has no Fourth Amendment claim, *see, e.g., Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843–44 (1998), and while some courts have held that conditions of pretrial release (such as requirements to appear in court and restrictions on travel) may constitute Fourth Amendment "seizures," other courts have concluded that they do *not*, *see generally Becker v. Kroll*, 494 F.3d 904, 915–16 (10th Cir. 2007) (collecting cases on both sides of the question). It therefore would be inequitable to assume the existence of a Fourth Amendment theory without giving the defendants an opportunity to address this question.

It would also be impracticable for the Court to consider a possible Fourth Amendment theory at this point. McDonough did not characterize his "fabrication of evidence" claim as a Fourth Amendment claim below, "and those courts did not have occasion to address . . . what consequences might follow from" such characterization. *Byrd v. United States*, 138 S. Ct. 1518, 1526–27 (2018). "Because this is 'a court of review, not of first view,'" and because "it is generally unwise to consider arguments in the first instance" the Court should decline to consider any Fourth Amendment theory McDonough might pursue. *Id.* at 1527 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)).

More fundamentally, McDonough's "malicious prosecution" claim *already* addresses any Fourth Amendment violation that may have occurred. As noted above, using the "malicious prosecution" label for any 1983 claim often generates confusion regarding the constitutional premise of the claim. *See supra* Part I.A. But here McDonough has consistently characterized his "malicious prosecution" claim as one based on a violation of the Fourth Amendment. *See, e.g.*, Pl.'s Opp'n to Mot. to Dismiss (ECF No. 108) 20. And the Second Circuit agrees that a "malicious prosecution" claim "essentially alleges a violation of the plaintiff's right under the Fourth Amendment to be free from unreasonable seizure." *Lanning v. City of Glens Falls*, 908 F.3d 19, 28 (2d Cir. 2018); *see also Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013) (holding that "to be actionable under section 1983

there must be a post-arraignment seizure, the claim being grounded ultimately on the Fourth Amendment's prohibition of unreasonable seizures").

McDonough has thus *already* had an opportunity to present a claim for a Fourth Amendment violation: The courts below dismissed that claim as to Smith, and McDonough continues to prosecute that claim against the other defendants. It is therefore not only unfair but also unnecessary for the Court to consider further Fourth Amendment arguments "this late in the day." *Clingman v. Beaver*, 544 U.S. 581, 598 (2005). The Court should refuse McDonough's invitation to do so. *See Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 237 (1st Cir. 2013); *Ferran v. Town of Nassau*, 11 F.3d 21, 23 (2d Cir.1993).

CONCLUSION

For these reasons, the writ should be dismissed as improvidently granted or the judgment of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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